No. 16,147

IN THE

United States Court of Appeals

For the Ninth Circuit

WILL M. GILLIS,

Appellant,

vs.

MINERS AND MERCHANTS BANK OF ALASKA, a Corporation,

Appellee.

APPELLANT'S BRIEF

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JURISDICTIONAL QUESTION.

The matter of jurisdiction of the Court below is not in any manner challenged since the judgment was rendered prior to any question of the jurisdictional standing of the Court being challenged.

STATEMENT OF FACTS.

This is an Appeal from a Judgment rendered by the Court below (without a trial) summarily dismissing the Appellant's Complaint and granting Judgment in favor of the Appellee upon its Counterclaims. The Judgment further providing that the sum of $11,225.00 shall be applied by the Appellee in

partial satisfaction of such Judgment from monies of the Appellant withheld by and in possession of the Appellee. (T.R. p. 123.)

The Judgment was secured by the Appellee based upon affidavits and depositions taken of Appellee's witnesses. (T.R. pp. 48, 85.)

The action was instituted by the Appellant and based upon a claim that the Appellant executed an assignment of a building contract in favor of the Appellee for certain monies which was to become due Appellant from the City of Nome, Alaska. The assignment was delivered upon the sole condition and understanding that after the Appellee has reimbursed itself for certain specific advances against such an assignment, the excess over and above such advances made by Appellee were to be promptly remitted to the Appellant. (T.R. p. 6.)

This clear understanding between the parties was had prior to the execution and delivery of such assignment and as a result of a mutual assent between them.

Appellant's claim was further based by way of a second cause of action upon the fact that by virtue of Appellee's conduct in violating the terms of the contract and failing to pay the Appellant the excess over and above the advances made against the assignment, the Appellant was deprived of operating capital in his contracting business and suffered substantial damages. (T.R. p. 9.)

The Appellee, in answer to such claims, made certain denials and counter-claims alleging that certain

monies in a prior collateral and unconnected transaction were paid to the Appellant as a result of a mistake. The Appellee thus asserted the right to hold the Appellant's monies against such claimed indebtedness. (T.R. p. 18.)

ARGUMENT.

I.

AN ISSUE OF FACT WAS RAISED PRECLUDING SUMMARY JUDGMENT.

Appellant contends (a) that the assignment was delivered on the sole understanding that the excess over and above the advances against such an assignment were to be delivered to the Appellant without being affected by any other transactions between the parties.

(b) That the Appellant was deprived of his day in court and an opportunity to submit proof in support of such issue of fact before the Court to determine whether such was the true understanding between the parties.

(c) That the Appellant was entitled to have his claim determined upon valid presentation of the facts whether he was damaged because of the conduct of Appellee in appropriating monies in fact due to the Appellant.

Motion for summary judgment can only be granted when there is a complete absence of any triable issue and the Court must indulge in granting the benefit of every doubt to the Plaintiff so as not to deprive him of his day in court. It was so held in the case of *Weisser v. Mursam Shoe Corporation,* 127 Fed. 2d

344, by the Second Circuit and discussed at length in 145 ALR 467, page 474, reading:

> "We do not of course decide here that Mursam was in fact a dummy. We hold only that triable issues were created by the plaintiff's allegations and the affidavits that Mursam was a tool of the other defendants, and that the lease was made because of representations believed by plaintiff that its liabilities were the obligations of the other defendants. The order granting summary judgment and dismissing the complaint is reversed and the case remanded."

The case of *Wooten v. Marshall,* 153 Fed. Sup. 759, involving an action to decree a joint venture between the parties concerning realty and compelling an accounting, the plaintiff contending that there was an alleged oral agreement between the parties concerning such realty, was held to create triable issues as to whether there was a joint venture between the parties precluding the granting of an application for summary judgment. Page 764 reads:

> "The question before this court on this motion is therefore a simple one. Are the facts admitted to be true by the defendant for purposes of the motion sufficient to create a triable issue as to whether there was a joint venture between parties as alleged in the complaint? If there was such a joint venture it is plain that the statute of frauds pleaded by the defendant do not apply and there is at the least a triable issue."

In the case of *Town Show Case & Cabinet Co. v. Equitable Fire & Marine Insurance Co.,* 248 Fed.

2d 338, in an action by insured against insurers for recovery under fire policies, on affidavits and other evidence in support of plaintiff's motion for summary judgment where a question was raised of a possible substitution or cancellation, it was held that the raising of that issue precluded summary judgment. Page 343 reads:

> "After studying this record and counsel's briefs, it is clear that the correctness of allowing summary judgment is a critical question. We think the trial court erred by disposing of the case under Rule 56, Federal Rules of Civil Procedure. It is our view of the evidence concerning substitution or cancellation of the relevant policies, that there was presented factual questions for a jury. Homan Mfg. Co. v. Long, 242 Fed. 2d, Ser. 645."

It is quite apparent and the Appellant's complaint clearly recites as cause one of the action that the assignment was a separate and distinct transaction and was delivered to the Appellee under certain conditions; that Appellee has accepted such an assignment with the clear understanding that upon the performance and completion of the work called for under the school contract by the Appellant, and the Appellee being reimbursed for the specific advances made against such an assignment, any monies over and above the Appellee's advances were to be remitted to the Appellant. This arrangement had been made by the parties after the alleged mortgage-note transaction claimed by the Appellee as a basis and alleged justification of withholding Appellant's monies. These

various transactions, in absence of testimony clarifying the respective rights of the parties, could not have been summarily disposed of by the Court below.

In the case of *Real Estate, Land, Title and Trust Co. v. Commonwealth Bond Corp.,* 63 Fed. 2d p. 237, involving the question of an accord and satisfaction where motion had been made for summary judgment, the Court stated as follows on page 39:

> "If an agreement was made in March 1930, as more particularly sworn to by the president of appellant, a question of fact may be presented as to whether or not, by agreements of parties, an accord and satisfaction was reached which would relieve the surety. The court may not strike out of the answer such an issue or decide the question of credibility without hearing evidence. The affidavit setting forth this defense cannot be disregarded. Federal & Deposit Co. v. U.S., 187 U.S. 315; Chamberlain v. Penn. R.R., 59 Fed. 2d, 986; Gee Investment Co. v. I.R.T., 235 N.Y. 133, 139, 139 NE 216."

II.

APPELLEE, IN ITS CAPACITY AS A BANK, HAS UNDERTAKEN TO REMIT THE PROCEEDS OF THE ASSIGNMENT OVER AND ABOVE THE ADVANCES MADE AGAINST SUCH, TO THE APPELLANT AND IS DUTY BOUND BY SUCH OBLIGATION.

In the case of *Russell v. The Bank of Nampa,* 169 Pac. 180, where a party was indebted to a bank, left with such bank as security, notes belonging to him

and authorizing the bank to collect upon them and apply a portion of the proceeds to the payment of his debt and instructing the bank not to deposit the balance, but to deliver such excess to a third person, and the bank, contrary to such instructions, deposited such monies in the bank, the balance was held to be not a general, but a "special" deposit. Page 181 reads:

> "The evidence established as a fact appellant's contention that such balance was to be paid over by the bank to him and that it was not to be deposited. Such balance then became a trust fund and not an asset of the bank. The relation of bailor and bailee was established between appellant and the bank and not the relationship of depositor and banker. Hall v. Beymer, 125 Pac. 561; Capital Nat. Bank v. Coldwater Nat. Bank, 49 Nebr. 786, 69 NW 115; in re Johnson 103 Mich. 109, 61 NW 352."

In the case of *Angleman v. Bank of America National Trust & Savings Association,* 219 Pac. 2d 868, the Court has held that where deposits in a bank are arranged for a special purpose, such as for the purpose of paying funds to a third person, such as paying bonds, mortgage indebtedness, meeting certain classes of checks, or paying a contractor for work being performed, have all the attributes of "special" deposits and are generally construed as such. Page 870 reads:

> "The question presented for determination is whether appellant bank was entitled to offset the monies owed by it to Pacific Jardena Bank against a debt owed to it by Pacific at Five

Points Branch. We are of the opinion that the bank was not entitled to such an offset. Appellant contends that it had the right of offset by reason of Section 440 of the Code of Civil Procedure, and that it also had that right because of its well recognized bankers lien. The right of offset exists in favor of a bank with which a customer makes general deposits, but we are of the opinion that in view of the intention of the parties, as disclosed by the terms of the contract and the practice followed by the bank in handling the account, the trial court properly concluded that the reserve account was not a general deposit, but one which was to be used for a specific purpose.

. . . A bank impliedly binds itself by accepting a special deposit not to set off against such a deposit a debt due it from the depositor. Nor can a bank which accepts a deposit of money for a special purpose, under an agreement that it will pay the amount when needed for that purpose, legally appropriate such a deposit to discharge the depositor's indebtedness to it. Stone v. Harris 80 Pac 711; Morton v. Woolery 48 ND 1132, 189 NW 232, 24 ALR 1111, 39 ALR 1138, in re Warrens Bank 209 Wis 121, 244 NW 594, 86 ALR 375 and numerous cases cited there."

The Appellant's contention is simple. An agreement has been made with the bank that a specific assignment, the subject matter of the suit, was to be treated in a certain manner by a special arrangement between the parties; that a violation of such an agreement occurred as a result of the bank's alleged claims against the fund.

A triable issue has been amply established and the Appellant by being deprived of the right to submit testimony and elicit additional proof as to the understanding of the parties, has been deprived of his due day in court. Such was never contemplated or intended by remedy of summary judgment.

Dated, April 7, 1959.

Respectfully submitted,

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